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 PROCUREMENT APPEALS

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Attorneys for Appellant
 Phil-Gets (Guam) International Trading Corp.
 dba J & B Modern Tech

OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL

In the Appeal of)
)
 Phil-Gets (Guam) International Trading Corp.)
 dba J & B Modern Tech,)
)
 Appellant.)
)
 And)
)
 Guam Community College,)
)
 Purchasing Agency.)
)
 _____)

**APPELLANT’S OPPOSITION TO
 PURCHASING AGENCY’S
 “MOTION FOR EXPEDITIOUS
 DISMISSAL”; CERTIFICATE OF
 SERVICE**

Docket No. OPA PA-17-003

I. INTRODUCTION

Appellant Phil-Gets (Guam) International Trading Corp. dba J & B Modern Tech (“J&B”) opposes the Purchasing Agency’s Motion for “Expeditious” Dismissal for the reasons set forth below. The Motion repeats positions already set forth by the Purchasing Agency, Guam Community College (“GCC”) in its denial of J&B’s protest and its Statement Answering Allegations of Appeal with some excess verbiage added (starting with the word “expeditious” in the title of the motion, as the Office of Public Accountability typically acts expeditiously in procurement appeals.) Therefore, with apologies for redundant repetition, this opposition to the

motion is to some extent a rehash of J&B's Notice of Appeal and J&B's Comments on Purchasing Agency's Statement, also with some excess verbiage added.

II. FACTS

As stated in GCC's background section in its motion, "[o]n October 3, 2016, GCC issued Bid Invitation No. GCC-FB-17-001 ('IFB' or 'Solicitations') for two connected items: (1) the ***design-build*** construction of a generator building and (2) the installation of a back-up generator system." (Emphasis added.) The Design-Build Institute of America defines "design-build" as follows:

Design-build is a method of project delivery in which one entity – the design-build team – works under a single contract with the project owner to provide design and construction services. One entity, one contract, one unified flow of work from initial concept through completion – thereby re-integrating the roles of designer and constructor. Design-build is an alternative to the traditional design-bid-build project delivery method. Under the latter approach, design and construction services are split into separate entities, separate contracts, separate work.

<https://www.dbia.org/about/Pages/What-is-Design-Build.asp>.

GCC then moves on to review certain provisions of the IFB. First GCC discusses language in the IFB which requires bidders to submit "descriptive literature" and "product brochures". It is undisputed that J&B submitted substantial descriptive literature and product brochures for the generators. Generators are usually manufactured to set standards in large numbers, rather than being designed one at a time for a particular buyer and location. Therefore, descriptive literature for

generators is available and is provided free of charge by the manufacturer to prospective customers. See Declaration of Generoso M. Bangayan, filed Apr. 10, 2017, at ¶4.

There is no pre-printed descriptive literature or brochure available for a design-built building since, by definition, it has not been designed yet. To state the obvious, even if one ignores the oxymoron, there is no manufacturer making pre-fabricated design-built buildings especially designed for GCC. Bangayan Decl. at ¶5. J&B and other bidders could not get shop drawings or descriptive literature for the generator building free of charge from some manufacturer. *Id.* GCC admits “J&B was the only bidder to describe the structure that it planned to design-build” in its bid, while complaining that J&B did not submit a sketch. If any narrative is “literature”, since J&B included a narrative describing the building in its bid, then J&B did in fact submit “descriptive literature” pertaining to the building. See Agency Report at GCC~Tab 8~AR0006 (portion of J&B’s bid with written description of aspects of the building). GCC has not identified any requirement in the IFB equating “descriptive literature” with “shop drawings”.

II. LEGAL ARGUMENT

A. Bidders were not required to submit shop drawings with their bids.

GCC falsely claims that J&B “posits . . . that the IFB’s requirement of shop drawings was ambiguous”. J&B posited no such thing. There was nothing ambiguous about the fact that bidders did not have to submit shop drawings with this bid. None of the bidders on this project submitted shop drawings with their bids, presumably because none of them saw any reason to suspect that on

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this one bid such drawings were somehow required. In approximately 20 years of bidding on and performing government projects, J&B has never seen a government invitation for bids or request for proposals that required a bidder or prospective contractor to submit completed shop drawings as part of the bid or proposal on a design-build project. Bangayan Decl. at ¶13. The same is doubtlessly true of the other bidders for this project. While GCC now says J&B and the other bidders should have requested “clarification”, the bidders obviously saw no need to “clarify” matters that were clear already to anyone who knew the definition of “design-build”.

A document is only “ambiguous” if it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has viewed the entire document and who is cognizant of the customs, practices, usages, and terminology as generally understood in the field. See Curry Road Ltd. v. K Mart Corp., 893 F.2d 509, 511 (2nd Cir. 1990). The bid instructions here are not ambiguous when viewed objectively by anyone familiar with the term “design-build”. A document is not ambiguous merely because one party has a subjective or, in this case, highly creative perception of its terms. See Niehaus v. Cowled Business Media Inc., 819 A.2d 765, 771 (Conn. 2003). An adjudicative body should not “torture words” to create ambiguity where the ordinary meaning leaves no room for ambiguity. *Id.* Similarly, an adjudicative body is not required to find ambiguity in a document when the interpretation urged by one party, in this case GCC, would strain the language of the document beyond its reasonable and ordinary meaning. See Steiner v. Lewmar, Inc., 816 F.3d 26, 32 (2nd Cir. 2016).

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Bidders such as J&B simply were not required to submit shop drawings for the generator building with their bids. GCC indisputably sought bids for a “design-built generator building.” *See, e.g.,* Agency Report at GCC~Tab 10~AR0030-31 (description of scope of work as including “[c]onstruct a design-build generator building”). From the very definition of “design-built”, as set forth above, a contract for a design-built project provides for a single contractor to provide the design and construction. The cost of the design work is included in the contractor’s bid and the design work for a design-built building is done by design professionals pursuant to the awarded contract; the “design” in “design”-build is not done for free before there ever is a contract.

GCC attempts to string together various sentences, phrases, and subsections from divergent parts of the IFB, combined with ungrammatical or unusual interpretations of some of those excerpts, in an attempt to show after the fact that there was at least some ambiguity about whether or not bidders had to provide expensive, certified shop drawings to GCC for free with their bids. GCC identifies no relevant reference to “shop drawings” for the design-built generator building other than in Section 1.2 in the Scope of Work, which identified items that are to be included in the cost proposal, not items that are to be completed and submitted with the bid.¹ “Shop drawings” prepared and certified for a fee by design professionals, such as architects and engineers, are different from

¹ There is also a reference to “shop drawings” in Section 1.4.C. in the Scope of Work, reprinted in the Agency Report at GCC~Tab 10~AR0032. However, that subsection, which also concerns work to be included in the cost proposal and done after an award, refers to drawings for the generator and auxiliary unit. GCC concedes that J&B submitted extensive and presumably sufficient information for the generator. Purchasing Agency’s Statement at 6 (citing GCC~Tab 8~AR0008-102).

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“descriptive literature” offered as free advertising from merchants ranging from those who manufacture generators to those who market, for example, attire or cereal. Section 1.2 provided:

Construct a design-build generator building and provide diesel electric generating unit with accessories, auxiliary equipment, and associated work as specified.

A. Provide GCC with shop drawings and submittals for the construction of design-build generator building to enclose the generator/set system.

1. Ensure drawings, shop drawings, and submittals provided are certified by master electricians and electrical contractors and subcontractors.
2. Ensure civil and structural engineers certify drawings, shop drawings, and submittals.
3. Submit certified drawings, shop drawings, and submittals to GCC for review and acceptance.
4. Ensure shop drawings and submittals are provided for feeder cables to the Allied Health Building and Building A.

B. Construct design-build building.

C. Install generator set/system sanctioned under the Buy America Act.

D. Connect generator set/system to buildings A and Allied Health Center.

E. Test to ensure a functionality of system.

Agency Report at GCC~Tab 10~AR0031.

Obviously the items in this list could not be completed before an award, given both financial and physical limitations. For example, the bidders could not all “[c]onstruct design-build building”

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as part of their bids unless the fully constructed buildings were stacked on top of each other. As discussed below, it would also have been impossible or at least extremely difficult to complete even the shop drawings before an award. GCC's position is that bidders were somehow supposed to determine through telepathy or some similar means that some of the items in this single section were to be completed before submitting a bid, while others were to be done after an award. GCC further takes the position that bidders were supposed to figure this out even though Section 1.2 is in Part 1 of the document is entitled "Cost Proposal", leading to the obvious conclusion that items in the following sections of Part 1 are to be included in the cost proposal in a bid, not completed before submitting a bid. GCC further takes the position that bidders were supposed to figure out that a "design-built" contract somehow required the design to be completed and submitted before there was a contract. It is clear now, as it was clear to all the bidders when they submitted their bids, that the only reference to "shop drawings" for the design-built building in the entire bid package referred to shop drawings (1) to be included in the bid price, and (2) to be done as part of the project after an award, not as part of the bid submission.

There is no merit to GCC's position that it is free to concoct bizarre interpretations of or manufacture alleged ambiguities in the plain language of the bid requirements after the bids have been submitted in order to have a pretext to reject all responsive bids.

B. A requirement for submitting shop drawings with a bid would be cost-prohibitive.

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GCC continues to take the quite frankly weird position that “shop drawings” certified by design professionals can be obtained at minimal cost because “descriptive literature” of various completed products, such as generators, can be obtained for little or no cost. While GCC’s position is factually incorrect, it may also be a red herring. The issue before the OPA is not whether shop drawings actually cost more than spare change, but whether shop drawings were required in the bid at all regardless of cost. Even if design professionals will prepare shop drawings for free in some fictional alternate universe, if the IFB did not require shop drawings be included in the bid package, omission of such non-required material would not render a bid unresponsive. On the other hand, it might be technically legal for an agency to include cost-prohibitive requirements in bid requirements, although this would be bad policy as it would effectively discourage or prevent competitive bidding.

In case the OPA does give weight to the cost of shop drawings, J&B notes that certified shop drawings are expensive. As indicated by the executive summary included in J&B’s bid, before preparing shop drawings for the building, J&B would have to secure a building permit, do a survey to determine building orientation and underground excavation clearance, and designate professional civil/structural and electrical engineers to do design work including shop drawings. Bangayan Decl. at ¶16. The estimated cost to prepare shop drawings with the required certifications for this project is \$24,000. *Id.* at ¶17.

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Again, design-build procurements replace the use of two separate bids and two separate contracts, the first for the design of a project and the second for the construction of the project pursuant to the design. If GCC had split the project into separate design and build procurements, is it seriously saying that it would expect design professionals to offer bids to do the design phase for free? Or would GCC more rationally expect the design contract to equal some more-than-nominal percentage of the total cost of the design and build phases combined, such as the approximately 5% estimated by J&B?

Suppose a consumer wanted to buy a Lexus and also wanted to build an elaborate garage to house the vehicle. The consumer could walk into Atkins Kroll or go on-line and get descriptive literature about the Lexus for free. However, an architect would charge for blueprints for the garage. The situation is the same if one wants both (1) a generator and (2) a specially-designed generator building approved by a master electrician and civil and structural engineers with feeder cables to another building. The unique plans for the latter cost more than advertisements for the former.

Finally on this issue, GCC's suggestion that J&B could have met the requirement for "shop drawings" for minimal expense by attaching a mere "sketch" of a building to its bid contradicts GCC's insistence elsewhere that the inclusion of "shop drawings" was mandated by Section 1.2.A of the Scope of Work. This subsection required shop drawings certified by, inter alia, a master electrician and civil and structural engineers. Design professionals face both possible loss of

licensure and breach of warranty claims for negligent certification. *See* K. Sido, F. O'Meara & A. Jensen, Architect and Engineer Liability: Claims Against Design Professionals §20.10 (CCH Inc. 2017). Thus it is unlikely that engineers would certify casual cheaply done "sketches" for any price, much less for a price that is not "cost prohibitive".

C. **A do-over is unfair to the responsive low bidder and inconsistent with the principles of procurement law.**

GCC seems to imply that J&B has no complaint because it will be able to submit a bid when the project is re-bid. Of course, on a re-bid, all of J&B's possible competitors will have had the opportunity to see J&B's previous low bid. One hopes that GCC's position is the result of a unique and bizarre, but nonetheless good faith, error. Otherwise there seem to be only two explanations for GCC's position. Either GCC wanted some better-connected bidder to win; or GCC hopes to save money with a re-bid where the amount of J&B's initial low bid will serve as a ceiling rather than a floor for bids the second time around.

The purposes of Guam's procurement law include providing for increased public confidence in procurement procedures, ensuring fair and equitable treatment of all persons who deal with the procurement system, fostering effective broad-based competition, and providing safeguards for the integrity of the procurement system. 5 GCA §5001(b). All of these policies are undermined if an agency can simply toss out all the responsive bids in a procurement on a pretext and give itself a mulligan in the hopes of a different or better result the second time around.

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IV. CONCLUSION

For the foregoing reasons, GCC's motion for expeditious dismissal should be denied, preferably with the OPA's usual expeditiousness, but otherwise at such time as the OPA is able to address the motion.

Respectfully submitted,

DOOLEY ROBERTS FOWLER & VISOSKY LLP

Date: April 17, 2017

By: Seth Forman
SETH FORMAN
Attorneys for Appellant Phil-Gets (Guam)
International Trading Corp. dba J&B Modern
Tech

CERTIFICATE OF SERVICE

I certify that on April 17, 2017, I caused the above Appellant's Opposition to Purchasing Agency's "Motion for Expeditious Dismissal" to be served by hand delivery on the Purchasing Agency's attorneys, Cabot Mantanona LLP, Edge Bldg., 2nd Floor, 929 South Marine Corps Drive, Tamuning, Guam 96913.

Date: April 17, 2017

By: Seth Forman
SETH FORMAN